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CASE NO. 98-

in the Supreme Court of the United States

OCTOBER TERM, 1998

JOHN G. HANLIN

Petitioner,

vs.

JERLE H. MARTIN, ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a party denied procedural due process when the court, without any notice or opportunity to be heard, makes factual findings regarding a transfer of a property interest pursuant to Federal Rules of Civil Procedure, Rule 25(c)?

2. Whether Rule 25(c) of the Federal Rules of Civil Procedure may be utilized as a device to determine the substantive rights of the parties or whether Rule 25(c) is confined as a procedural rule?

3. Whether it is beyond a district court's subject-matter jurisdiction to interfere with state court probate proceedings?

4. Whether a decision of the district court immediately transferring a property interest is appealable under the collateral order doctrine and/or under the *Fogay* Rule?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page, except for party James E. Hanlin who is a respondent. Merle E. Hanlin was the Plaintiff in this case but is no longer a party to these proceedings by virtue of the decision of the district court finding a transfer of her property interest.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

INDEX TO APPENDICES iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 2

A. Proceedings In The District Court Below 2

B. The Court Of Appeals Proceedings Below 4

LEGAL ARGUMENT: REASONS RELIED ON FOR ALLOWANCE OF THE WRIT 5

A. The Present Decision Is In Conflict With Applicable Decisions Of The Court 5

1. The Order of the District Court is Appealable under the Collateral Order Doctrine 5

2. The Order of the District Court is Appealable under the Fogay Rule as an Order Transferring Property 14

B. Important Questions Of Law Are At Issue Which Should Be Settled By The Court 14

CONCLUSION 15

APPENDICES

APPENDIX A: Memorandum of Decision of United States District Court for the Middle District of Pennsylvania (November 18, 1997) ..... App.A 1-8

APPENDIX B: Order of United States District Court For the Middle District of Pennsylvania (November 18, 1997) ..... App.B 1-2

APPENDIX C: Order of United States Court of Appeals for the Third Circuit (May 15, 1998) ..... App.C

APPENDIX D: Order of United States Court of Appeals for The Third Circuit Denying Sur Petition for Panel Rehearing with Suggestion for Rehearing En Bank (June 29, 1998) ..... App.D

TABLE OF AUTHORITIES

Cases **Page(s)**

Bauer v. Commerce Union Bank, Clarksville, Tennessee,
859 F.2d 438 (6th Cir. 1988) 5,6,7,8,11,12

Board of Regents v. Roth
408 U.S. 564, 33 L. Ed.2d 548, 92 S. Ct. 2701 (1972) 10

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541, 69 S Ct 1221, 93 L.Ed.
1528 (1949). 5,6,13

Coopers & Lybrand v. Livesay,
98 S. Ct. 2454, 437 U.S. 463, 57 L. Ed. 2d 351 (1978) 8

Fogay v. Conrad,
6 How. (47 U.S.) 201,
12 L.Ed. 404 (1948). 14

Goldberg v. Kelly,
397 U.S. 254,
25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). 10

Hardy v. Johns-Manville Sales Corp.,
681 F.2d 334 (5th Cir. 1982) 10

Hofheimer v. McIntee,
179 F.2d 789, 792 (7th Cir. 1950) 3,7

In Re Paoli Railroad Yard PCB Litigation,
916 F.2d 829 (3d Cir. 1990) 10

Luxliner P.L. Export Co. v. RDI-Luxliner Inc.,
13 F.3d 69 (3d Cir. 1993). 5,9,10,12

Mathews v. Eldridge,
424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) 10

TABLE OF AUTHORITIES-(Continued)

Constitutions And Statutes **Page(s)**

U.S. Const. Amend. XIV, § 1 1

11 U.S.C. § 323(b) 6

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 5

28 U.S.C. § 1332 1

F.R.C.P. 5 11

F.R.C.P. 17(a) 3,5,6,7

F.R.C.P. 25(a)(1) 2,3,4

F.R.C.P. 25(c) 2,3,4,7,9,11,12,15

Secondary Authority

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Wright, Miller & Kane, Federal Practice and Procedure
(2d ed. 1986) 4,6

Petitioner John G. Hanlin respectfully petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit in the case of *Martin v. Hanlin*, CA No. 98-7039 (June 29, 1998), and shows the following.

OPINIONS BELOW

There are no official or unofficial reports of the opinions delivered in this case by other courts. Copies of the decisions of the U.S. District Court for the Middle District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit are reproduced in the Appendix to this Petition.

JURISDICTION

The date of the decision of the U.S. Court of Appeals for the Third Circuit is May 15, 1998. The date of denial of the Sur Petition for Panel Rehearing with Suggestion for Rehearing In Banc is June 29, 1998. This Petition is timely filed within 90 days of the denial of the Sur Petition for Panel Rehearing.

The statutory provision conferring jurisdiction on this Court to review the judgment by writ of certiorari is 28 U.S.C. § 1254(1). The basis for federal jurisdiction in the court of first instance is under 28 U.S.C. § 1332.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Const. Amend. XIV, § 1, says at its pertinent part "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Federal Rules of Civil Procedure, Rule 25(c), states in pertinent part, as follows:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

STATEMENT OF THE CASE

A. Proceedings In The District Court Below

After the death of Plaintiff Merle E. Hanlin ("Plaintiff") on May 26, 1997, respondents Jerle H. Martin and James E. Hanlin ("Respondents") filed on July 11, 1997, a Motion for Substitution of Plaintiff "on behalf of the Estate of Merle E. Hanlin and on behalf of themselves." The motion was brought only pursuant to F.R.C.P. 25(a)(1).

On November 18, 1997, the District Court issued its memorandum of decision granting the Motion for Substitution of Plaintiff. (Appendix A.) On the same date, the District Court issued its order granting the Motion for Substitution of Plaintiff. (Appendix B.) The Motion for Substitution of Plaintiff was not granted by the District Court pursuant to any of the grounds made or raised by Respondents in their moving or reply papers submitted in support of the Motion for Substitution of Plaintiff.

The District Court, without the issue ever being raised by any of the parties to the proceedings below, addressed the propriety under Rule 25(c) of a substitution when a transfer of interest occurs during the course of an action. The District Court's opinion in this regard reads as follows:

> The court notes that the parties did not brief the issue of substitution pursuant to Rule 25(c). The court, however, has the discretion to substitute a party pursuant to Rule 25(c), and in the interests of judicial economy, it will address the propriety of substitution under this rule. (Appendix A.)

The District Court without giving Petitioner any notice or an opportunity to be heard, made factual findings regarding a transfer of interest to Respondents upon Plaintiff's death under Rule 25(c). Also, the District Court made factual finding regarding the application of Rule 25(c) even though the District Court recognized that the courts have found that the substitution provisions of Rule 25(c) have no application to a transfer brought about by the death of a party *pendente lite* since such a substitution is governed solely according to Rule 25(c).

The District Court's entire factual findings, reasoning and conclusion regarding the application of Rule 25(c) is set forth in one paragraph of its Memorandum of Decision as follows:

> Courts have found that an involuntary transfer of an interest by reason of the death of a party is to be analyzed solely according to Rule 25(a). See, *Hofheimer v. McIntee*, 179 F.2d 789, 792 (7th Cir. 1950). The transfer of interest in the instant situation, however, came about voluntarily due to the Agreement, rather than solely by reason of Plaintiff's death. The Agreement provides for the transfer of Plaintiff's interest to Movants upon Plaintiff's death. The instant suit was filed prior to Plaintiff's death, and

> thus the transfer of interest to Movants occurred during the pendency of the suit. Therefore, the court finds Rule 25(c) the appropriate mechanism by which to substitute Movants for Plaintiff in the instant situation. (Appendix A.)

The decision of the District Court constitutes clear error and is manifestly unjust.

B. The Court Of Appeals Proceedings Below

On November 28, 1997, Petitioner filed a Notice of Appeal seeking review and reversal of the District Court's decision. Respondents filed a motion to quash the appeal. On May 15, 1998, the United States Court of Appeal, for the Third Circuit granted the motion to quash on the grounds that the District Court's decision is not appealable at this time. (Appendix C.)

On June 29, 1998, the Sur Petition for Panel Rehearing with Suggestion for Rehearing In Banc was denied. (Appendix D.)

LEGAL ARGUMENT: REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. The Present Decision Is In Conflict With Applicable Decisions Of The Court

1. The Order of the District Court is Appealable under the Collateral Order Doctrine

Review is appropriate because the ruling of the Court of Appeals for the Third Circuit conflicts with the decision of this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949).

On May 15, 1998, the Court of Appeals for the Third Circuit issued its order holding that Petitioner's appeal "is dismissed for lack of jurisdiction because it is not appealable at this time." The order is appended to this Petition as Appendix C.

The decision of this Court in *Cohen v. Beneficial Industrial Loan Corp., supra,* is fully applicable in the instant situation to this case. Here, as in *Cohen*, the three-pronged test to determine whether the District Court's order is a collateral order that is final and immediately appealable under §1291 is met. The decision in *Cohen* is directly opposite the decision in the present case.

The case of *Bauer v. Commerce Union Bank, Clarksville, Tennessee*, 859 F.2d 438 (6th Cir. 1988) which the Court of Appeals cited as authority for its May 15, 1998, decision is clearly distinguishable from the case at bar. In *Bauer*, the court recognized that the "collateral order doctrine" permits immediate appeal of a small class of prejudgment orders. As stated by the court, to qualify as

a collateral order, the order must meet three requirements: 1) it must conclusively determine the disputed question; 2) it must resolve an important issue that is separate from the merits of the action; and 3) the order must be effectively unreviewable on appeal from a final judgment. *Id.* at 440, quoting from *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949).

The *Bauer* Court found that two of the three requirement for application of the collateral order doctrine were present in the case. The court, however, held that an order substituting the Bauers' trustee as plaintiff in their stead as plaintiffs was not immediately appealable because the order failed to meet the second requirement of "resolv[ing] an important issue completely separate from the merits of the action." *Id.* at 440. The *Bauer* Court found that the second requirement of an "important issue" being resolved to qualify as a collateral order could not be met since substituting the trustee in bankruptcy for plaintiffs Charles and Nellie Bauer was an order that was well recognized and entirely proper with regard to the bankruptcy. As a result, since substitution of the trustee is so well established, an order granting substitution in the bankruptcy would not resolve an "important issue."

The *Bauer* court reasoned that it is well established as a matter of law in bankruptcy that the right to pursue causes of action formerly belonging to the debtor vests in the trustee for the benefit of the estate. The debtor has no standing to pursue such causes of action, only the trustee. As the Court stated: "It is equally clear that the trustee in bankruptcy acts as representative of the estate. It is the trustee who 'has capacity to sue and be sued.' 11 U.S.C. § 323(b)." *Id.* at 440.

The *Bauer* Court found that there cannot be any serious debate that in a bankruptcy related matter the trustee should be substituted as the party plaintiff pursuant to Federal Rules of Civil Procedure 25(c), which permits the court to order substitution "in case of any transfer of interest." Based thereon, the court held that "Questions that obviously admit of only one answer, it seems to us, are not important to justify consideration in separate interlocutory appeals." *Id.* at 440, emphasis added.

The instant case is radically different as to the facts which faced the court in *Bauer*. Unlike in *Bauer*, in the case at bench the decision of the District Court did in fact "resolve an important issue completely separate from the merits of the action." Equally important, in this case the question of whether the substitution of Respondents was proper is not a question that "admits of only one answer."

Here, the District Court's order determines a claim of right and resolves an important issue completely separate from the merits of the action. The District Court's order determines fundamental and important rights of the parties, but which rights are not related to the cause of action presented. The order determines whether the property interest of Plaintiff Merle E. Hanlin under an agreement for payment of $100,000.00 ("Agreement") has been transferred to Respondents and is no longer an asset of the Plaintiff and of her estate. (Appendix A.)

The order of the District Court resolves an important issue among the parties because the order will immediately affect the rights of the parties. The order of the District Court results in an immediate transfer of Plaintiff's property interest under the Agreement for $100,000.00 to Respondents.

If review by this Court is not granted, Plaintiff's rights will be lost forever because the decision of the District Court will result in the amount of money owed under the Agreement, if any, not being part of Plaintiff's Estate. At present, the Agreement is listed as an asset in the inventory of the Estate of Merle E. Hanlin but will be forever lost if the District Court's order transferring this property interest to Respondents is not reviewed. The District Court's decision involves the rights of Plaintiff Merle E. Hanlin under the Agreement; the legal and practical value of which would be destroyed if it were not vindicated before trial. See, *Coopers & Lybrand v. Livesay*, 98 S. Ct. 2454, 2458, 437 U.S. 463, 468-469, 57 L. Ed. 2d 351 (1978). See also, *Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction* 2d § 3911, pp. 329-370.

The order of the District Court determines the rights of the parties separate from, and collateral to, rights asserted in the action. The order is independent of the cause of action in the underlying complaint regarding whether the Agreement is enforceable and whether amounts of money are owing under the Agreement. The order is not a step toward the disposition of the merits of the case regarding whether the Agreement has been breached. The order of the District Court will not be merged into a final judgment determining whether a debt is owed and any monetary judgment awarded. Instead, the final judgment will decree the amount of money owed, if any, based on the alleged breach of the Agreement.

Accordingly, this case, unlike *Bauer*, does resolve an important issue completely separate from the merits of the action. Contrary to the facts in *Bauer*, in the present case the question of whether the substitution of Respondents was proper is not a question that "admits of only one answer." The exact opposite is true.

In the case at bar, there is a substantial question as to whether the District Court abused its discretion in ordering substitution. This abuse of discretion is evident because the District Court failed to follow the precedent of the Third Circuit Court of Appeals in deciding the motion for substitution. The Third Circuit in *Luxliner P.L. Export Co. v. RDI-Luxliner Inc.* 13 F.3d 69 (3d Cir. 1993) held that in ruling on a Rule 25(c) motion due process requires that an evidentiary hearing must be held when competing affidavits may result in one or more genuine issues of fact.

This Third Circuit stated as follows in this regard: "where competing sworn affidavits may result in one or more genuine issues of material fact, a district court may not decide factual issues arising in the context of Rule 25(c) motions simply by weighing the sworn affidavits against one another." *Id.* at 72. The Third Circuit found that the district court "should have conducted an evidentiary hearing" in deciding the Rule 25(c) motion and reversed and remanded for further proceedings. *Id.* at 75.

In the present case, Petitioner was completely denied of all due process. The issue of "transfer of issue" under Rule 25(c) had never been raised by Respondents before the District Court as a ground for substitution of Plaintiff. Petitioner was totally deprived of notice and an opportunity to be heard. Before the discretion of the district court may be invoked pursuant to Rule 25(c), a party must be given a full and fair opportunity to litigate the issue.

The decision of the District Court providing for substitution was not merely a procedural device designed to facilitate the conduct of the case. To the contrary, the District Court by its order transferred the interest and rights of the Estate of Merle E. Hanlin created by an Agreement for $100,000.00 to Respondents without notice or any

opportunity of Petitioner to present any facts to the District Court on the issue to be decided.

Petitioner, individually and as the personal representative of the Estate of Merle E. Hanlin, was denied the right to present facts to the District Court because no notice was ever provided. As stated by the Third Circuit Court of Appeals in its decision of *Luxliner*:

> Before a party may be deprived of a property interest, due process requires, at a minimum, notice and an opportunity to be heard. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332-33, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). The adversarial process "assumes that a factfinder will give the parties an adequate opportunity to be heard; if it does not, it cannot find facts reliably." *In Re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 854 (3d Cir. 1990) See also *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982) (right to a full and fair opportunity to litigate an issue is protected by the due process clause). *Id.* at 72.

Here, the Estate of Merle E. Hanlin has been deprived of its property interest under the Agreement that gives rise to this litigation. The District Court's Memorandum of Decision states as follows: "The transfer of interest in the instant situation, however, came about voluntarily due to the Agreement, rather than solely by reason of Plaintiff's death. The Agreement provides for the transfer of

Plaintiff's interest to Movants upon Plaintiff's death." (Appendix A.)

Rule 25(c) provides that the district court "upon motion" may direct the person to whom the interest is transferred to be substituted in the action. Further, Rule 25(c) mandates that the "motion" shall be served on the parties as provided in Federal Rules Civil Procedure, Rule 5, and upon persons not parties in the manner provided in Rule 4 for the service of a summons. No motion under Rule 25(c) was ever filed or served by any party to this action.

The correctness of granting substitution in the present case did not admit of only one answer as in the *Bauer* case. There are genuine issues of material fact as to whether the "Agreement provides for the transfer of Plaintiff's interest to Movants upon Plaintiff's death" as found by the District Court.

Respondents themselves admitted that the Agreement did not provide that Plaintiff's interest were transferred to Respondents upon Plaintiff's death. In their Motion for Substitution of Plaintiff, Respondents state to the District Court in pertinent part as follows: "If and when funds are recovered from Hanlin on behalf of Mrs Hanlin's estate, the appropriate steps will be taken in Franklin County with respect to the estate to make sure that any funds recovered for the estate are properly administered. (Emphasis added.) Respondents' Motion for Substitution of Plaintiff.

As established by the above quote from Respondents' Motion for Substitution of Plaintiff, Respondents never interpreted the Agreement to provide for a transfer of Plaintiff's interest to Respondents. Instead, Respondents interpreted the Agreement and understood that Plaintiff's interest was not transferred to them, but would properly

become part of the Estate of Merle E. Hanlin. It defies logic and reason for the District Court to make a factual finding under Rule 25(c) of a transfer of Plaintiff's interest when the Respondents themselves recognized that the interest of Plaintiff would not be transferred to them but would become part of the Estate of Merle E. Hanlin.

At a bare minimum, the above evidence presents issues of material fact as to whether the Agreement provides for such a transfer. Petitioner, in accordance with the Third Circuit's holding in *Luxliner*, was entitled to an evidentiary hearing on the factual issue of whether there was a transfer of Plaintiff's interest.

Thus, in the present case, unlike *Bauer*, there is abundant evidence of abuse of discretion by the District Court in ordering the substitution. Opposite to the facts in Bauer, the question of whether a transfer occurred and whether substitution was proper is not a question that admits of only one answer. An interlocutory appeal is justified in this action because the answer of whether there was a transfer of Plaintiff's interest is a question of fact that does not admit of but one answer.

Allowing a separate interlocutory appeal in this case would be proper since all the requirements to qualify as a collateral order have been met. The order of the District Court conclusively determines that Plaintiff's property interest has been transferred to Respondents. The order is a final disposition of this very important collateral issue regarding the transfer of Plaintiff's interest to the Respondents.

Based on the order of the District Court being final under the collateral order doctrine, there is jurisdiction for the hearing of the appeal. Although the order is not final in

the sense that it terminates the litigation, it is not merely a step toward final judgment. It is distinct from the merits of the case as to the issue of whether the Agreement is enforceable and the question of whether, and to what extent, any amount of money is owed under the Agreement.

The rights of the Plaintiff and of her Estate will be lost irreparably if review of the District Court's decision is postponed until final judgment. By the time of final judgment, the probate of Plaintiff's estate will be final and an important asset of the estate will have been lost by the order of the District Court transferring Plaintiff's interest. As stated by the Court in *Cohen*:

> The decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. This Court has long given this provision of the statute this practical rather than technical construction.
>
> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. *Id.* at 546-47.

The decision of this Court in *Cohen* is therefore fully applicable in the instant situation. Review is justified because the decision in the instant matter conflicts with the decision of the Court in *Cohen.*

2. The Order of the District Court is Appealable under the Fogay Rule as an Order Transferring Property

The decision of the Third Circuit is in conflict with the principle enunciated by the Court that an order immediately transferring property is appealable. *Fogay v. Conrad*, 6 How. (47 U.S.) 201, 12 L.Ed. 404 (1948).

Application of the principle announced in *Fogay* provides a secure basis to allow an appeal from the District Court's decision which found an immediate transfer of Plaintiff's interest. Here, as in *Fogay*, the decree of the District Court "decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant . . ." *Id.* at 203-204. As in *Fogay*, the decision of the District Court to transfer the property is final and the pending appeal is proper. See also, *Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction* 2d § 3910, pp. 306-329.

The order of the District Court "decides the right to the property in contest" and concludes that the right has been transferred to Respondents. The right to the property under the Agreement has been disposed of by the District Court since the interest has been transferred to Respondents and is no longer a property interest of the Plaintiff and her Estate.

Review is appropriate because the ruling in the present case conflicts with the decision of the Court in *Fogay*.

B. Important Questions Of Law Are At Issue Which Should Be Settled By The Court

This controversy involves questions of exceptional importance. The District Court has determined that

Plaintiff's interest in the Agreement has been transferred to Respondents and is no longer an asset of Plaintiff's Estate. The important precedent-setting question of whether Rule 25(c) may be utilized as a device to determine the substantive rights of the parties or whether Rule 25(c) is confined as a procedural device is presented by this Petition.

This Petition also presents the important question whether it is beyond the District Court's subject-matter jurisdiction to interfere with state court probate proceedings. Since the Agreement is an asset of the Estate of Merle E. Hanlin, the District Court has taken "control of the property in custody of the state court." The District Court has thereby interfered with the state probate proceedings of the Estate of Merle E. Hanlin.

CONCLUSION

For all the foregoing reasons set forth herein, review and relief should now be granted. Petitioner prays the Court issue its writ of certiorari and accept jurisdiction over this case.

September 18, 1998

Respectfully submitted,

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In Propria Persona

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MERLE E. HANLIN by JILL A. McCRACKEN ESQUIRE, Special Guardian, Plaintiff	: CIVIL ACTION 1:CV-96-0441 : FILED HARRISBURG, PA : NOV 18, 1997 :MARY E. D'ANDREA, CLERK
vs.	
JOHN G. HANLIN, Defendant and Third Party Plaintiff	
vs.	
JERLE H. MARTIN and DOES 1 through 50, inclusive, Third Party Defendants	

MEMORANDUM

Before the Court is a motion filed by Jerle H. Martin and James Hanlin ("Movants") to substitute themselves as Plaintiffs in the above-captioned suit. The parties have briefed the issues and the motion is ripe for disposition.

I. Background

The instant suit arises from a written agreement (the "Agreement") executed between Plaintiff Mrs. Merle Hanlin and Defendant John G. Hanlin, her son. Plaintiff filed a complaint alleging that under the Agreement, she lent $100,000.00 to Defendant. As alleged, the Agreement provides further, in relevant part, as follows:

1. First Party [Defendant] will pay off the above obligation to Second Party [Plaintiff] in monthly

> installments of Three Thousand ($3,000.00) Dollars on October 1, 1994 and a like sum on the first (1st) day of each month thereafter until said obligation of One Hundred Thousand ($100,000.00) Dollars is fully paid.
>
> . . .
>
> 3. Should Second Party [Plaintiff] die before the aforesaid obligation is fully paid, Second Party [Defendant][1] will continue payments thereon to Second Party's [Plaintiff's] children, Jerle E. Martin and James E. Hanlin [Movants], in equal shares.

(Compl. Exhibit P-2). Plaintiff further alleges that Defendant is in default on the payments, and is suing to recover the amount in default.

On May 26, 1997, subsequent to filing a complaint, Plaintiff passed away. Plaintiff's will was probated by Defendant in Franklin County, Pennsylvania, and Defendant was named executor of Plaintiff's estate. Letters testamentary were granted to Defendant on June 4, 1997. Defendant, therefore, has been placed in the curious position of legal representative of the plaintiff in a lawsuit in which he is also the defendant. Defendant has not, however, moved to substitute himself--in his capacity as executor of Plaintiff's estate--as Plaintiff; nor has Defendant taken any other action on Plaintiff's behalf with respect to the instant suit. Movants filed the instant motion to substitute themselves as Plaintiffs in the instant suit.

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[1] The context of the Agreement makes it apparent that Paragraph 3 contains a typographical error, and that the Agreement purports to require that upon Plaintiff's death, Defendant would pay the remainder of his obligation to Movants.

II. Discussion

Movant argue that under Fed. Rule Civ. P. 25(a)(1) they are proper parties to be substituted for Plaintiff and to sue on her behalf, asserting that their personal interests in the Agreement comport with, and are derived from, Plaintiff's interests. In the alternative, Movants argue that they should be joined as Plaintiffs pursuant to Fed. Rule Civ. P. 17(a) as real parties in interest.[2] The court, however, holds that Fed. Rule Civ. P. 25(c)--rather than Rule 25(a)--is the appropriate vehicle for substitution of plaintiff in the instant case. Movants' arguments and the court's analysis of the application of Rule 25(c) will be addressed seriatim.

A. Rule 25(a): Substitution When a Party Dies

Rule 25(a) provides, in relevant part, as follows:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party. . .

Fed. Rule Civ. P. 25(a)(1). Effectively, Rule 25(a) allows a

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[2] Movants did not argue they should be substituted as plaintiffs under Rule 17(a) in their principal brief in support of the instant motion, but rather, raised this argument in their reply brief. Parties are generally not permitted to introduce new arguments in reply briefs, since the opposing party does not have the opportunity to respond to such arguments. United States v. Boggi, 74 F.3d 470, 478 (3d Cir. 1996). However, the court will make an exception and address Movants' Rule 17 argument in this case.

substituted plaintiff to continue the action and defend the interests of the deceased plaintiff. Thus the court's inquiry under Rule 25(a)(1) is as follows: (1) does the claim survive the death of the plaintiff; and (2) are Movants the "proper parties" to be substituted?

Movants assert, and Defendant doe not deny, that Plaintiff's claim is not extinguished by her death. The court agrees. Whether a cause of action survives the death of a party is a question of substantive, not procedural, law. 7C Wright, Miller & Kane, Federal Practice and Procedure §1952 (2d ed. 1986). Thus the court must look to the applicable substantive law for guidance--in this case, Pennsylvania law. Id. Pennsylvania law provides that "all causes of action or proceedings, real or personal shall survive the death of one or more joint plaintiffs or defendants." 42 PA. CONS. STAT. ANN. § 8302. Therefore, Plaintiff's claim survives her death.

Movants argue further that they are "proper parties" to be substituted for Plaintiff because they have a direct interest in any recovery on behalf of the Plaintiff's estate. Further, Movants assert that Defendant's personal interest in the instant suit is in conflict with his duties as legal representative and executor of Plaintiff's estate.[3] Movants cite no authority, however, which indicates that their personal interests are relevant to the determination of

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[3] Defendant's alleged conflict of interest as both Defendant in the instant case and executor of Plaintiff's estate is not an issue before the court. Defendant has not moved for substitution as plaintiff and, moreover, Movants do not attempt to remove Defendant as executor of Plaintiff's estate. Rather, the issue for the court's determination is whether Movants should be properly substituted for Plaintiff.

whether they are "proper parties" to substitute as Plaintiffs under Rule 25(a). Rather, Movants cite McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985) for the proposition that under certain circumstances, the court may substitute someone other than a party's legal representative under Rule 25(a). In McSurely, the court permitted substitution of the distributee of an unprobated estate as a "proper party" under Rule 25(a). The context of Plaintiff's estate in the instant case is distinguishable from that in McSurely, however. Plaintiff's estate remains in the initial stages of probate proceedings, and has not been distributed. Thus McSurely does not guide the court's analysis of whether Movants are "proper parties" for substitution.

The weight of authority on this issue indicates that the "proper party" for substitution under Rule 25(a) is the legal representative of the estate. See Rende v. Kay, 415 F.2d 983 (D.C. Cir. 1969); Madison v. Vintage Petroleum, Inc., 872 F. Supp. 340 (1994). The Third Circuit Court of Appeals has stated that, "the most liberal construction of [Rule 25(a)] would not permit substitution of a party's attorney who did not have status as legal representative of the deceased party's estate." Boggs v. Dravco Corp., 532 F.2d 897, 900 (3d Cir. 1976). Therefore, Movants are not "proper parties" for substitution under Rule 25(a), and the court will not order substitution pursuant to this Rule.

B. **Rule 17(a): Real Party in Interest**

Movants argue, in the alternative, that they should be substituted as Plaintiffs to defend their personal interests in the instant dispute pursuant to Fed. Rule Civ. P. 17(a).

Rule 17(a) provides, in relevant part, as follows:

> Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification or commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Fed. Rule Civ. P. 17(a). Movants argue that because the Agreement which is the subject of the instant case provides that Movants are entitled to the uncollected balance of the loan, they became the real parties in interest upon the death of Plaintiff. Rule 17(a), however, applies only when a person becomes the real party in interest because of a transfer of interest prior to the commencement of the suit. See 7C Wright, Miller & Kane, Federal Practice and Procedure § 1958 (2d e. 1986). In the instant case, the Agreement transferred Plaintiff's interest to Movants upon Plaintiff's death. Since this occurred after commencement of the suit, Movants cannot be substituted as plaintiffs pursuant to Rule 17(a).

C. Rule 25(c): Substitution When a Transfer of Interest Occurs During the Course of an Action

The court notes that the parties did not brief the issue of substitution pursuant to Rule 25(c). The court, however, has the discretion to substitute a party pursuant to Rule 25(c), and in the interests of judicial economy, it will

address the propriety of substitution under this rule.

Rule 25(c) provides, in pertinent part, as follows:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Fed. Rule Civ. P. 25(c). "Because . . . substitution under Rule 25(c) does not ordinarily alter the substantive rights of parties but is merely a procedural device designed to facilitate the conduct of a case, a Rule 25(c) decision is generally within the district court's discretion." Luxliner P.L. Export v. RDI/Luxliner, 13 F.3d 69, 71-72 (3d Cir. 1993). "Rule 25(c) . . . is designed to allow the action to continue unabated when an interest in the lawsuit changes hands." Matter of Covington Grain Co., Inc., 638 F.2d 1362, 1364 (5th Cir. 1981). Rule 25(c), as distinguished from Rule 17(a), deals with the situation where a transfer of interest takes place during the course of the action. 2 Moore's Manual: Federal Practice and Procedure, § 1309[6]; Pacamor Bearing, Inc. v. Minebea Co., Ltd., 892 F. Supp. 347 (D.N.H. 1995).

Courts have found that an involuntary transfer of an interest by reason of the death of a party is to be analyzed solely according to Rule 25(c). See Hofheimer v. McIntee, 179 F.2d 789, 792 (7th Cir. 1950). The transfer of interest in the instant situation, however, came about voluntarily due to the Agreement, rather than solely by reason of Plaintiff's death. The Agreement provides for the transfer of Plaintiff's interest to Movants upon Plaintiff's death.

The instant suit was filed prior to Plaintiff's death, and thus the transfer of interest to Movants occurred during the pendency of the suit. Therefore, the court finds Rule 25(c) the appropriate mechanism by which to substitute Movants for Plaintiff in the instant situation.

III. **Conclusion**

Based on the foregoing discussion, Movants' motion for substitution of plaintiff will be granted. An appropriate order will issue.

/S/ SYLVIA H. RAMBO
SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: November 18, 1997.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MERLE E. HANLIN by JILL A. McCRACKEN ESQUIRE, Special Guardian,	: CIVIL ACTION 1:CV-96-0441
Plaintiff	: FILED HARRISBURG, PA NOV 18, 1997 :MARY E. D'ANDREA, CLERK
vs.	
JOHN G. HANLIN,	
Defendant and Third Party Plaintiff	
vs.	
JERLE H. MARTIN and DOES 1 through 50, inclusive,	
Third Party Defendants	

ORDER

In accordance with the accompanying memorandum or law, **IT IS HEREBY ORDERED THAT:**

1) Movants' motion for substitution of Plaintiff is **GRANTED**.

2) Jerle H. Martin and James Hanlin shall be substituted as Plaintiffs in the place of Merle E. Hanlin, by Jill A. McCracken, Esquire, Special Guardian, pursuant to Rule 25(c) of the Federal Rules of Civil Procedure.

3) The clerk of court shall amend the caption accordingly.

4) This case is placed on the February 1998 trial list. Jury selection for cases on the February list will begin

at 9:30 a.m. on Monday, February 2, 1998, in Courtroom No. 3, Eighth Floor, Federal Building, Third and Walnut Streets, Harrisburg, Pennsylvania. Trials will commence following the competition of jury selections. A date certain for trial may be discussed at the pretrial conference; however, counsel are expected to be prepared to go forward with trial at anytime during the trial term.

5) Pretrial memoranda shall be filed on or before 12 o'clock noon on Friday, January 23, 1998, in conformity with the local rules.

6) The pretrial conference is scheduled for Friday, January 30, 1998 at 10:00 a.m. on the chambers of Courtroom No.3.

/S/ SYLVIA H. RAMBO
SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: November 18, 1997.

APPENDIX C

APS-169

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 98-7039

JERLE H. MARTIN, ET AL.

vs.

JOHN G. HANLIN

Appellant

(M.D. Pa. Civ. No. 96-cv-00441)

Present: BECKER, CHIEF JUDGE, NYGAARD and ROTH, CIRCUIT JUDGES

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect;

(2) Appellees' motion to quash;

(3) Appellees' brief in support thereof; and

(4) Appellant's brief in opposition thereto in the above-captioned case.

Respectfully,

Clerk

PDS/JAD/je

ORDER

The Motion to Quash is granted and the foregoing appeal is dismissed for lack of jurisdiction because it is not appealable at this time. See 28 U.S.C. § 1291; see also Bauer v. Commerce Union Bank, Clarksville, Tennessee, 859 F.2d 438, 440 (6th Cir. 1988).

By the Court,

/S/ EDWARD R. BECKER
Chief Circuit Judge

DATED: May 15, 1998

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7039

JERLE H. MARTIN, ET AL.
v.
JOHN G. HANLIN, Appellant
(M.D. Pa. Civ. No. 96-cv-00441)

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, Circuit Judges,

---

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/S/ EWARD R.BECKER
Chief Circuit Judge

DATED: June 29 1998

(2)

No. 98-482

FILED
OCT 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

JOHN G. HANLIN,

Petitioner,

vs.

JERLE H. MARTIN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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12 pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Is the order of the Court of Appeals of the Third Circuit quashing Petitioner's appeal as interlocutory ripe for review by this Court?

2. Do the issues presented by Petitioner merit consideration by this Court?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. The Order of the Court of Appeals for the Third Circuit Quashing Petitioner's Appeal as Interlocutory Is Not Ripe for Review by this Court 2

II. The Issues Presented by the Petition for Certiorari Do Not Merit Review by this Court 3

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Bauer v. Commerce Union Bank, 859 F.2d 438 (6th Cir. 1988) 4

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) 3

RULES:

Sup. Ct. Rule 10(c) 3

Sup. Ct. Rule 11 2

COUNTERSTATEMENT OF THE CASE

This case arises out of the breach of an agreement entered into by Petitioner and his mother, Merle E. Hanlin, on September 19, 1994, pursuant to which Petitioner promised to pay his mother the sum of $ 100,000.00 in installments, A copy of the Agreement is attached hereto as Appendix A. When Petitioner failed to make the payments as scheduled, suit was instituted against him in the Court of Common Pleas of Franklin County, Pennsylvania. Petitioner then removed the case to the U.S. District Court for the Middle District of Pennsylvania.

Merle E. Hanlin died on May 26, 1997. Mrs. Hanlin named Petitioner, her oldest son, executor of her estate. This put him, as the lower court noted, "in the curious position of legal representative of the Plaintiff in a lawsuit in which he, is also the Defendant." (Petitioner's Appendix A-2.) Since Petitioner was not about to pursue a case against himself on behalf of the estate, Mrs. Hanlin's other two children, Respondents, filed a motion with the lower court to have themselves substituted as Plaintiffs. As Petitioner correctly notes, Respondents sought to act "on behalf of the Estate of Merle E. Hanlin and on behalf of themselves." (Petition, p. 2) Respondents wish to act on behalf of the estate to recover whatever amounts had not been paid to their mother before her death and on behalf of themselves because Paragraph 3 of the Agreement provided that upon their mother's death, if the entire obligation had not been paid, the remaining payments were to go to them.

The District Court granted the motion pursuant to Federal Rule of Civil Procedure 25(c). That order was

appealed to the U.S. Court of Appeals for the Third Circuit. On a motion by Respondents the Third Circuit quashed the appeal on the grounds that it was interlocutory. (Petitioner's Appendix C.) Petitioner's petition for rehearing was denied, (Petitioner's Appendix D.) The Petition for Writ of Certiorari to this Court followed. This brief is written in opposition thereto.

REASONS FOR DENYING THE WRIT

I. The Order of the Court of Appeals for the Third Circuit Quashing Petitioner's Appeal as Interlocutory Is Not Ripe for Review by this Court.

Rule 11 of the rules of this Court provides as follows:

> A petition for writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U.S.C. § 2101(e).

Rule 11, Rules of the Supreme Court of the United States.

This case is even weaker than a case contemplated by Rule 11. Not only has judgment not been entered in the Court of Appeals, the appeal has been dismissed. No reason has been advanced by Petitioner that constitutes, "a showing that this case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this

Court." It is submitted, therefore, that the Petition for Certiorari is simply premature.

II. The Issues Presented by the Petition for Certiorari Do Not Merit Review by this Court.

Petitioner appears to argue that this case falls under Rule 10(c), Considerations Governing Review on Certiorari, of this Court. Petitioner argues that the Third Circuit, "has decided an important federal question in a way that conflicts with the relevant decisions of this court." (Rule 10(c)) Petitioner argues that the decision of the Third Circuit to quash the appeal as interlocutory is in conflict with the decision of this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Petitioner is mistaken in his understanding of *Cohen*.

Cohen governs, "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. In *Cohen*, a New Jersey statute provided that in stockholders' derivative suits plaintiffs could be liable for the reasonable expenses and attorneys' fees of the defense and could be required to post security before proceeding with the case. The lower court held that the state statute did not apply to stockholders' derivative suits in federal court. The court of appeals reversed. This Court affirmed. It is obvious that the posting of security is separate and independent from the merits of the case. It is also obvious that if the

question of security was not addressed at the outset of the case, and was delayed until the conclusion of the case, the protection of the corporate defendant would be lost.

Such considerations are not present in the instant case. The interests of the estate of Merle E. Hanlin and the interests of the Respondents are inseparable from the merits of the case. Respondents are the only persons with an interest in seeing the estate of their mother recover from their brother, the Petitioner. They also have an interest in recovering against their brother on their own behalf. Their claims are not, "separable from, and collateral to, rights asserted in the action." Their rights are central to the case. Moreover, they are the only persons, other than Petitioner, with standing to pursue the claims. It is inconceivable that Petitioner will pursue the case against himself.

In quashing the appeal, the Third Circuit cited *Bauer v. Commerce Union Bank*, 859 F.2d 438 (6th Cir. 1988). The *Bauer* case involved whether or not a trustee in bankruptcy should be substituted as plaintiff in a lawsuit brought by the bankrupts. The district court allowed the substitution. The Sixth Circuit affirmed stating, "other courts of appeals have held that orders substituting parties or permitting parties to intervene are interlocutory and non-appealable. *See, Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1325 (10th Cir. 1978); *In re: Sylvania Electric Products*, 220 F.2d 423, 424 (1st Cir. 1955); *7C C. Wright, A. Miller & M. Kane, Federal Practice Procedure*, Sec. 1962 (2d ed. 1986)." 859 F.2d at 440. Respondents submit that as in *Bauer* the order in this case substituting parties is interlocutory and nonappealable.

Petitioner also misstates the decision of the District Court. Petitioner repeatedly states that, "the order determines whether the property interests of Plaintiff Merle E. Hanlin under an agreement for payment of $100,000.00 ("Agreement") has been transferred to Respondents and is no longer asset of the Plaintiff and of her estate. . . . The order of the District Court resulted in immediate transfer of Plaintiff's property interest under the Agreement for $100,000.00 to Respondents." (Petition p. 7.) An examination of the District Court's opinion discloses that these statements are not true. The petition to substitute Jerle H. Martin and James E. Hanlin as plaintiffs specified two interests: (1) the interest of the Estate of Merle E. Hanlin in the amount due Mrs. Hanlin before her death on May 26, 1997, and (2) the interests of Jerle H. Martin and James E. Hanlin for amounts due them after Mrs. Hanlin's death.

This distinction was recognized by the District Court, The District Court held that Mrs. Hanlin's claim was not extinguished by her death. "Movants assert and Defendant does not deny, that Plaintiffs claim is not extinguished by her death. The court agrees." (Petitioner's Appendix, A-4.) However, because the agreement under which suit was originally brought provided that upon Mrs. Hanlin's death the remaining payments went to Respondents, they also had a direct interest in pursuing a claim against Petitioner. The lower court stated the following:

> Courts have found that an involuntary transfer of an interest by reason of the death of a party is to be analyzed solely according to Rule 25(c). (Citation omitted.) The transfer of interest

> in the instant situation, however, came about voluntarily due to the Agreement rather than solely by reason of Plaintiff's death. The Agreement provides for the transfer of Plaintiff's interest to Movants upon Plaintiff's death. The instant suit was filed prior to Plaintiff's death, and thus the transfer of interest to Movants occurred during the pendency of the suit. Therefore, the court finds Rule 25(c) the appropriate mechanism by which to substitute Movants for Plaintiff in the instant situation.

(Petitioner's Appendix, A-7-8.)

Respondents respectfully submit that none of the issues raised by Petitioner are issues worthy of consideration by this Court at this time. The case before the District Court should be allowed to continue and the issues resolved.

CONCLUSION

This case does not merit further review by this Court. For the reasons stated above, the Petition for Certiorari should be denied.

Respectfully submitted,

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Attorney I.D. #07013
HARTMAN UNDERHILL & BRUBAKER LLP
Attorneys for Respondents

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APPENDIX

THIS AGREEMENT

MADE the 19th day of September, in the year nineteen hundred and ninety-four (1994);

BETWEEN John G. Hanlin, First Party, AND Merle E. Hanlin, Second Party.

WITNESSETH: WHEREAS, First Party is the son of Second Party and is indebted to her in the amount of One Hundred Thousand ($100,000.00) Dollars;

AND WHEREAS, First Party and Second Party have agreed to settlement of this obligation in the manner hereinafter set forth.

NOW KNOW ALL MEN BY THESE PRESENTS, that First Party and Second Party, intending to be legally bound, agree as follows:

1. First Part will pay off the above obligation to Second Party in monthly installments of Three Thousand ($3,000.00) Dollars each, First Party to pay Second Party the sum of Three Thousand ($3,000.00) Dollars on October 1, 1994 and a like sum on the first (1st) day of each month thereafter until said obligation of One Hundred Thousand ($100,000.00) Dollars is fully paid.

2. As long as First Party complies with the terms of this Agreement, no interest will be due on this obligation.

3. Should Second Party die before the aforesaid obligation is fully paid, Second Party will continue payments thereon to Second Party's children, Jerle E. Martin and James E. Hanlin, in equal shares.

4. If Second Party has any debts at the time of her death, First Party shall fully pay the same, and should she not have resources to pay her funeral expenses, First Party shall pay the same.

This Agreement shall be binding on the heirs, executors, administrators and assigns of each party.

IN WITNESS WHEREOF, First Party and Second Party have caused this Agreement to be duly executed the day and year first above written:

WITNESS:

/s/ Illegible _____ /s/ John G. Hanlin _____ (SEAL)
John G. Hanlin First Party

/s/ Rudolf Wertime _____ /s/ Merle E. Hanlin _____ (SEAL)
Merle E. Hanlin Second Party